

LEGAL UPDATES

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## Federal Judge Certifies Interlocutory Appeal on Retroactivity of BIPA Amendments

On June 10, 2025, Judge Georgia N. Alexakis of the U.S. District Court for the Northern District of Illinois issued an order allowing the defendant in an Illinois Biometric Information Privacy Act (BIPA) action to immediately appeal her ruling that recent amendments to the act—which limit the number of claims that can accrue under the act—do not apply retroactively.

The issue of retroactivity in applying the BIPA amendments stems from *Cothron v. White Castle System, Inc.*, a 2023 Illinois Supreme Court decision holding that a separate BIPA claim accrues each time a private entity scans or transmits an individual’s biometric identifier, not just the first time. Since BIPA provides statutory damages of \$1,000 or \$5,000 for each violation, this ruling exposed employers to massive potential liability. For example, in *Cothron*, the defendant estimated potential damages to exceed \$17 billion. Apparently recognizing this concern, the court suggested in its decision that the legislature clarify its intent regarding damages under the act.

The Illinois legislature appeared to respond to the invitation by amending BIPA in August 2024. The amendments specify that a private entity collecting the same biometric identifier from the same person using the same method, even on multiple occasions, commits only a single violation—entitling the aggrieved individual to a single recovery. This amendment rejects the “per scan” damages theory. The amendments also clarified that an electronic signature now suffices to provide written consent for the collection and use of biometric data, a change that may streamline compliance for employers using electronic onboarding and HR systems.

Since the passage of the amendments, however, courts have consistently held that they constitute a substantive change to the law, not a clarification, and

therefore do not apply retroactively. As a result, employers with BIPA claims pending against them that were filed prior to the amendments have not received the benefit of the amendments.

Clearly, much hangs on the retroactivity of the amendments, and this circumstance informed Judge Alexakis' order, in which she cited how a prospective appeal would take on abstract issues of law with a high likelihood to impact the course of future litigation. In the matter, the plaintiff alleged that the defendant collected his biometric information via fingerprint scan each time he visited its facilities between 2019 and 2024. The defendant moved for partial summary judgment, arguing the amendments to BIPA limited the plaintiff to a single recovery of damages. Judge Alexakis denied the motion, holding that the amendments do not apply retroactively and that the "per scan" liability theory from *Cothron* still applied to the case. Notably, however, she stated that a plaintiff suing today would be entitled to only one recovery.

### **Case background and procedural posture**

The case involves a truck driver who visited the defendant's facilities as part of his work, alleging that he was required to register and scan his fingerprints upon entry and exit, and that the defendant failed to disclose what was done with his information or how it would be stored. The lawsuit was filed in April 2024, before the BIPA amendments took effect. The defendant removed the case to federal court and moved for summary judgment after the amendments were enacted, arguing that the amendments should limit the plaintiff to a single recovery.

The defendant then sought, and Judge Alexakis just granted, permission to immediately appeal the ruling to the Seventh Circuit. Judge Alexakis recognized novel and complex legal issues were involved and that resolution of the issue would advance termination of the litigation.

The Seventh Circuit now has discretion to accept or decline the interlocutory appeal. A Seventh Circuit ruling on the issue could offer significant clarity about the liability exposure faced by employers with pending BIPA claims against them. If the Seventh Circuit agrees to hear the appeal, its decision will likely have far-reaching implications for the hundreds of BIPA cases currently pending in Illinois courts and could shift the landscape for settlement and litigation strategy. The Seventh Circuit may also choose to certify the retroactivity question to the Illinois Supreme Court for a definitive ruling.

### **Practical implications for employers**

For employers with operations or employees in Illinois, the outcome of this appeal is highly significant. If the Seventh Circuit reverses and finds the amendments retroactive, employers facing pre-amendment BIPA claims could see their potential exposure drastically reduced—from potentially thousands of "per scan" violations to a single violation per individual, per method. Conversely, if the

current judicial consensus holds, employers will remain exposed to potentially massive damages for each instance of biometric data collection or transmission that occurred before August 2024. This is especially critical for companies using biometric timekeeping or access systems, such as fingerprint or facial recognition, prior to the amendments.

The Seventh Circuit's decision could also influence the prospects for settlement in pending cases and may prompt further legislative or judicial clarification. There is also a possibility that the Seventh Circuit could certify the retroactivity question to the Illinois Supreme Court for a definitive answer. Until greater clarity emerges, courts are likely to continue denying the benefit of the amendments to pre-August 2024 claims.

### **What this means to you**

Employers with ongoing or threatened BIPA litigation should:

Monitor the progress of the appeal and any further developments in the Seventh Circuit or Illinois Supreme Court;

Evaluate their exposure in pending cases based on the current "per scan" accrual rule for pre-amendment claims;

Ensure that all current biometric data collection and retention practices comply with the amended BIPA, including the use of electronic signatures for consent and clear written policies;

Consider reviewing and updating vendor contracts to reflect the new statutory requirements;

Assess insurance coverage for potential BIPA liability, as some policies may exclude statutory damages or privacy claims.

### **Contact us**

If you have questions regarding this decision or compliance with the Illinois Biometric Information Privacy Act, contact Anne Mayette, Samuel Mitchell, Jennifer Ralph, or your Husch Blackwell attorney.